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16 Attorneys for Defendants

17 IN THE UNITED STATES DISTRICT COURT
18 FOR THE DISTRICT OF ARIZONA

19 Barbara Allen, Richard Dippold,
20 Melvin Jones, Donald McCarty,
Richard Scates and Walter G. West,
21 individually and on behalf of all others
similarly situated,

22 Plaintiffs,

23 vs.

24 Honeywell Retirement Earnings Plan,
Honeywell Secured Benefit Plan,
Plan Administrator of Honeywell
25 Retirement Earnings Plan, and Plan
Administrator of Honeywell Secured
Benefit Plan,

27 Defendants.

28 No. CV04-0424 PHX ROS

**DEFENDANTS' REPLY
STATEMENT OF FACTS
IN SUPPORT OF
DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT ON STATUTE OF
LIMITATIONS**

1 Plaintiffs' Response to Defendants' Separate Statement of Facts in Support of
2 Defendants' Motion For Summary Judgment on Statute of Limitations (Docket #372)
3 ("Response") mischaracterizes the facts presented in defendants' Separate Statement of
4 Facts (Docket #341) ("Statement") and incorporates improper and incorrect legal
5 arguments. Defendants offer the following reply.

6 Preliminarily, plaintiffs' relevance objections (included in their response to
7 twelve of sixteen paragraphs) present a legal question. They do not controvert the facts
8 set forth in defendants' Statement. And they certainly do not preclude the Court from
9 entering judgment in defendants' favor—the only basis for those objections is plaintiffs'
10 unsupported legal conclusion that "none of the documents in evidence could have
11 triggered the statute of limitations." *See, e.g.*, Response ¶ 1. Thus, a ruling in
12 defendants' favor on the legal question of when plaintiffs' claims accrued will moot
13 those objections. The Court should accordingly disregard them in determining whether
14 facts are disputed and ruling on the merits of defendants' motion. *See L.R. Civ. 56.1(b)*.

15 Plaintiffs have also objected and moved to strike several paragraphs of
16 defendants' Statement based on conclusory assertions that defendants have not
17 established "the frequency and regularity" of behavior regarding the distribution of plan
18 documents that is needed to satisfy Federal Rule of Evidence 406 and *United States v.*
19 *Angwin*, 271 F.3d 786, 799 (9th Cir. 2001), *overruled on other grounds in United States*
20 *v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (*en banc*). *See Response ¶¶ 2, 3, 7, 10.* Those
21 assertions cannot withstand scrutiny.

22 Rule 406 provides that "[e]vidence of the ... routine practice of an organization,
23 whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to
24 prove that the conduct of the person on a particular occasion was in conformity with the
25 habit or routine practice." It does not preclude the evidence of customary distribution
26 practices that defendants offer here because that evidence is not offered to prove that the
27 plan documents were *sent*. Defendants do not need to rely on "routine practice"
28 evidence under Rule 406 to create an inference that the plan documents were distributed

1 because they present *direct* evidence of these facts. *See* Decl. of James McLeod ¶ 6
 2 (Docket #341, Ex. 1) (“This letter and the enclosed [1984] brochures were distributed to
 3 Garrett Corporation employees pursuant to Garrett Corporation’s usual practice.”); *id.*
 4 ¶ 7 (“The May 1984 Summary Plan Description was distributed to employees in keeping
 5 with this practice.”); Decl. of Craig Chapman ¶ 8 (Docket #341, Ex. 2) (“The April 1996
 6 SPD was distributed to employees of Former Garrett and Non-Union Textron Locations
 7 according to this customary practice.”).

8 Instead, defendants’ customary distribution practice evidence is offered for the
 9 different purpose of establishing that plaintiffs *received* the relevant plan documents.
 10 Courts have repeatedly found that such evidence forecloses ERISA plaintiffs’ arguments
 11 that they never received plan documents. *See, e.g., Hunter v. Lockheed Martin Corp.*,
 12 No. C-99-20996 RMW, 2002 WL 1492137, at *2-3 (N.D. Cal. June 7, 2002) (testimony
 13 of defendant’s employees regarding defendant’s “policies and practices with respect
 14 to ... the distribution of summary plan descriptions” established “that it is more likely
 15 true than not true that [plaintiff] received” the SPDs); *Campbell v. Emery Air Freight*
 16 *Corp.*, Civ. A No. 93-6568, 1995 WL 286722, at *1 (E.D. Pa. May 9, 1995) (granting
 17 summary judgment to defendant where declaration from plan administrator established
 18 that “the summary plan description and updates were sent by first-class mail to the
 19 Plaintiffs’ last-known address” according to defendants’ “regular business practice
 20 and ... records” and plaintiffs failed to contradict that assertion). This is particularly so
 21 where, as here, the underlying events occurred long ago. *Cf. Brenner v. Johns Hopkins*
 22 *Univ.*, 88 F. App’x 555, 560 (4th Cir. 2004) (affirming district court’s ruling that
 23 defendant “carried its burden” on the issue of distribution of retirement plan SPDs and
 24 other materials in light of the “absence of contrary evidence” from the plaintiff and
 25 because plaintiff’s “claim of error relie[d] on the unsurprising fact that [defendant’s]
 26 employees have inconsistent or failed recollections of long-ago events”) (quotation and
 27 citation omitted).

Finally, even if defendants had offered the evidence of their customary distribution practices to establish that the plan documents were sent (which they have not), plaintiffs' objections and motions to strike would still fail. *Angwin* lists "the degree to which the conduct is reflexive or semi-automatic as opposed to volitional," "the specificity or particularity of the conduct," and "the regularity or numerosity of the examples of the conduct" as factors that the Court may consider in determining whether certain conduct satisfies this rule, but also notes that the touchstone of the Rule 406 inquiry is the "overall reliability of the evidence"; thus, district courts should use the three *Angwin* factors "as guides." 271 F.3d at 799 & n.3.

Defendants' evidence regarding the distribution of the 1984 brochure, the 1984 SPD, and the 1996 SPD more than satisfies this standard. The declaration of James McLeod, who worked in Garrett Corporation's Human Resources departments for over five years, sets forth in detail Garrett's customary mailing practices with respect to retirement plan communications over a four-year period. *See* McLeod Decl. ¶¶ 4-5. Importantly, although Rule 406 specifically provides that such evidence is admissible "whether corroborated or not," the evidence regarding the Garrett Corporation's routine mailing practice is bolstered by McLeod's statement that, in fact, he received his copy of the 1984 brochure "at [his] home at the time it was mailed." *Id.* ¶ 6. The declaration of Craig Chapman similarly describes the routine mailing practice of Honeywell's predecessor company in and around 1996, and establishes that the 1996 SPD was distributed according to that practice. *See* Decl. of Craig Chapman ¶¶ 7-8 (Docket #341, Ex. 2). Thus, like their relevance objections, plaintiffs' objections to this evidence are not well founded, and this Court should disregard them and deny plaintiffs' motions to strike.

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1 As for the specific facts set forth in defendants' Statement, defendants reply as
2 follows:

3 1. Plaintiffs do not deny paragraph 1 of defendants' Statement. Their only
4 response, aside from raising the meritless relevance objection discussed above, is to
5 assert that they need more time to conduct discovery to admit or deny paragraph 1. But,
6 as detailed in Defendants' Opposition to Plaintiffs' Motion to Conduct Additional
7 Discovery ("Rule 56(f) Opp."), filed herewith, they are not entitled to the additional
8 discovery they seek. Paragraph 1 of defendants' Statement should be deemed admitted.

9 2. Plaintiffs do not deny paragraph 2 of defendants' Statement. Their only
10 response, aside from raising the meritless general objections discussed above, is to assert
11 that they need more time to conduct discovery to admit or deny paragraph 2. But, as
12 detailed in Defendants' Rule 56(f) Opp., filed herewith, they are not entitled to the
13 additional discovery they seek. Paragraph 2 of defendants' Statement should be deemed
14 admitted.

15 3. Plaintiffs do not deny paragraph 3 of defendants' Statement. Their only
16 response, aside from raising the meritless general objections discussed above, is to assert
17 that they need more time to conduct discovery to admit or deny paragraph 3. But, as
18 detailed in Defendants' Rule 56(f) Opp., filed herewith, they are not entitled to the
19 additional discovery they seek. Paragraph 3 of defendants' Statement should be deemed
20 admitted.

21 4. Aside from plaintiffs' meritless relevance objection, discussed above,
22 paragraph 4 of defendants' Statement is undisputed.

23 5. Aside from plaintiffs' meritless relevance objection, discussed above,
24 paragraph 5 of defendants' Statement is undisputed.

25 6. Plaintiffs do not deny paragraph 6 of defendants' Statement. In addition to
26 raising the meritless relevance objection discussed above, they assert that they need
27 more time to conduct discovery to admit or deny paragraph 6. But, as detailed in
28 Defendants' Rule 56(f) Opp., filed herewith, they are not entitled to the additional

1 discovery they seek. Plaintiffs also object and move to strike paragraph 6 “as offering
 2 legal conclusions and argumentative” and on the ground that “[t]he brochures speak for
 3 themselves.” But paragraph 6 of defendants’ Statement merely restates, in nearly
 4 identical language, facts that plaintiffs have already admitted. *Compare* Pls.’ Separate
 5 Statement of Facts in Supp. of Pls’ Cross Mot. for S.J. ¶ 20 with Statement ¶ 6. Thus,
 6 plaintiffs are foreclosed from arguing these points, and the Court should rule that
 7 paragraph 6 of defendants’ Statement is undisputed.

8 7. Plaintiffs do not deny paragraph 7 of defendants’ Statement. Their only
 9 response, aside from raising the meritless general objections discussed above, is to assert
 10 that they need more time to conduct discovery to admit or deny paragraph 7. But, as
 11 detailed in Defendants’ Rule 56(f) Opp., filed herewith, they are not entitled to the
 12 additional discovery they seek. Paragraph 7 of defendants’ Statement should be deemed
 13 admitted.

14 8. Plaintiffs do not deny paragraph 8 of defendants’ Statement. In addition to
 15 raising the meritless relevance objection discussed above, they assert that they need
 16 more time to conduct discovery to admit or deny paragraph 8. But, as detailed in
 17 Defendants’ Rule 56(f) Opp., filed herewith, they are not entitled to the additional
 18 discovery they seek. Moreover, although plaintiffs state that the “1996 SPD speaks for
 19 itself,” paragraph 8 discusses Honeywell and its predecessor companies’ *purpose* in
 20 designing the 1996 SPD, not the text of the document itself. Plaintiffs do not deny, or
 21 point to any contrary evidence on, this point. Thus, paragraph 8 of defendants’
 22 Statement should be deemed admitted.

23 9. Aside from plaintiffs’ meritless relevance objection, discussed above,
 24 paragraph 9 of defendants’ Statement is undisputed.

25 10. Plaintiffs do not deny paragraph 10 of defendants’ Statement. Their only
 26 response, aside from raising the meritless general objections discussed above, is to assert
 27 that they need more time to conduct discovery to admit or deny paragraph 10. But, as
 28 detailed in Defendants’ Rule 56(f) Opp., filed herewith, they are not entitled to the

1 additional discovery they seek. Paragraph 10 of defendants' Statement should be
 2 deemed admitted.

3 11. Aside from plaintiffs' meritless relevance objection, discussed above,
 4 paragraph 11 of defendants' Statement is undisputed.

5 12. Paragraph 12 of defendants' Statement is undisputed.

6 13. Paragraph 13 of defendants' Statement is undisputed. Paragraph 13 of
 7 plaintiffs' Response misquotes the parties' tolling agreement. Defendants do not dispute
 8 that the tolling agreement states, "[n]or shall this agreement be construed as an
 9 admission by Former Garrett Employees that any action or claims are barred by the
 10 statute of limitations or would be barred by the statute of limitations in the absence of
 11 this agreement." Decl. of Susan Martin, Ex. A, at 1-2 (Docket #167).

12 14. Paragraph 14 of defendants' Statement is undisputed.

13 15. Paragraph 15 of defendants' Statement is undisputed.

14 16. Plaintiffs do not deny paragraph 16 of defendants' Statement. In addition
 15 to raising their meritless relevance objection, discussed above, plaintiffs object to
 16 paragraph 16 of defendants' Statement as a "legal conclusion." But paragraph 16 of
 17 plaintiffs' Response does not controvert the fact that the Honeywell Earnings Plan,
 18 amended and restated as of January 1, 2000, was the operative plan document on March
 19 1, 2004. To the extent that plaintiffs' Response attempts to assert that the Honeywell
 20 Retirement Earnings Plan does not apply to plaintiffs, that assertion is foreclosed by their
 21 complaint, which states that plaintiffs "became participants in the Honeywell
 22 Retirement Earnings Plan." *See Am. Compl. ¶ 3* (Docket #47). Otherwise, defendants
 23 do not dispute that plaintiffs have quoted the Plan language accurately, and note that the
 24 Plan also states that "all provisions of this Plan relating to administration and fiduciary
 25 responsibility shall apply to the Supplements" that describe the merged plans.
 26 Honeywell Ret. Earnings Plan, at HW540 (Docket #16, Ex. P). In any event, the
 27 discussion in paragraph 16 of plaintiffs' Response seems to raise a different, legal
 28 question as to the meaning of a portion of the preamble to the plan that is not relevant to

1 the facts asserted in paragraph 16 of defendants' Statement. Paragraph 16 of defendants'
2 Statement should accordingly be deemed admitted.

3 Respectfully submitted this 25th day of January, 2008.

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1 CERTIFICATE OF SERVICE

2 I do certify that on January 25, 2008, I electronically transmitted the
3 attached document to the Clerk's Office using the CM/ECF System for filing and
4 transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

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6 s/Kelly Dourlein _____
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